No. 01-174

IN THE

Supreme Court of the United States

D. JOSEPH LONG, Individually And Derivatively as a Shareholder of Regency Home Fashions, Inc.,

Petitioner,

v.

LOUIS L. SILVER, Individually and In his Fiduciary Capacity as a Shareholder of REGENCY HOME FASHIONS, INC.; LOUIS L. SILVER As Trustee of the Express Trust of the Louis L. Silver Living Trust; All Unknown Beneficiaries of the Louis L. Silver Living Trust; RONALD GROSSMAN, Individually and In his Fiduciary Capacity as an Officer and Shareholder of REGENCY HOME FASHIONS, INC.; KEVIN CREEGAN, Individually and In his Fiduciary Capacity as an Officer and Shareholder of REGENCY HOME FASHIONS, INC.; REGENCY HOME FASHIONS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

NORRIS D. WOLFF
KLEINBERG, KAPLAN, WOLFF & COHEN, P.C.
551 Fifth Avenue
New York, NY 10176
(212) 986-6000

JAMES R. FOX
ALAN M. RULEY*
BELL, DAVIS & PITT, P.A.
100 North Cherry Street, Suite 600
Post Office Box 21029
Winston-Salem, NC 27120-1029
(336) 722-3700

Attorneys for Respondents

* *Counsel of Record*

QUESTION PRESENTED FOR REVIEW

Whether the United States Supreme Court should grant certiorari to review an opinion by the United States Court of Appeals for the Fourth Circuit, 248 F.3d 309 (4th Cir. 2001), staying the action and ordering arbitration, where the opinion was in accord with longstanding precedent from this court and the Fourth Circuit, and where there is no conflict among the circuits.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Regency Home Fashions, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	iv
Statement of the Case	1
Factual Background	1
Reasons for Denying the Writ	5
I. Where, as here, the arbitration clause is broad, the dispute is presumed to be arbitrable.	6
II. There is no conflict among the Circuits.	7
III. There is no "language of the agreement and intent of the parties" test.	9
IV. The Magistrate's reversed Opinion in this case was clearly erroneous.	18
Conclusion	19

TABLE OF CITED AUTHORITIES

Page

Cases:

Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995) 6

American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88 (4th Cir. 1996) ..7, 16, 17, 18

AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986) 6, 7

Battaglia v McKendry, 233 F.3d 720 (3d Cir. 2000) 8, 14

Chiron Corp. v. Ortho Diagnostic Systems, Inc., 207 F.3d 1126 (9th Cir. 2000) 8, 11

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985) 11, 12

FedEx Ground v. Metheany, 2000 WL 1585267 (N.D. Cal. 2000) 12

In re Kinoshita & Co., 287 F.2d 951 (2d Cir. 1961) 15

Kiefer Specialty Flooring, Inc. v. Tarkett, Inc., 174 F.3d 907 (7th Cir. 1999) 7, 17, 18

Cited Authorities

Page

Lebanon Chemical Corporation v. United Farmers Plant Food, Inc., 179 F.3d 1095 (8th Cir. 1999), *cert. denied*, 528 U.S. 1079, 120 S. Ct. 798, 145 L. Ed. 2d 673 (2000) 8, 12

Louis Dreyfus Negoce, S.A. v. Blystad Shipping & Trading, Inc., 252 F.3d 218 (2d Cir. 2001) ..8, 14, 15

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995) 6

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) 6, 7

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) 7

P & P Industries, Inc. v. Sutter Corporation, 179 F.3d 861 (10th Cir. 1999) 7, 17, 18

Plastech Exterior Systems, Inc. v. Deere & Company, 2000 WL 631329 (N.D. Ill. 2000) 12

Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967) 17

Cited Authorities

	Page
Siefert v. U.S. Home Corp., 750 So. 2d 633 (Fl. 1999)	18
Stout v. Byrider, 228 F.3d 709 (6th Cir. 2000), *cert. denied*, __ U.S. __, 121 S. Ct. 1088, 148 L. Ed. 2d 963 (2001)	8, 13
Telecom Italia, SPA v. Wholesale Telecom Corp., 248 F.3d 1109 (11th Cir. 2001)	8, 9, 10
Texaco, Inc. v. American Trading Transportation Company, Inc., 644 F.2d 1152 (5th Cir. 1981)	8, 13
United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960)	7
Statutes:	
9 U.S.C. § 1, *et seq.*	1
9 U.S.C. § 2	6

STATEMENT OF THE CASE

This matter is before the Court upon the Petition of D. Joseph Long ("Mr. Long" or "Petitioner") for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. The underlying decision was filed on April 27, 2001, and is published at 248 F.3d 309 (4th Cir. 2001).

In accordance with the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* and well-settled precedent from this Court and other Courts, the Fourth Circuit decision reversed an erroneous decision of the United States Magistrate Judge for the Western District of North Carolina and ordered that, pursuant to agreements signed by the Petitioner, this civil action be stayed and the claims made by Petitioner referred to arbitration.

FACTUAL BACKGROUND

This matter arises from the termination of Mr. Long's employment with the defendant Regency Home Fashions, Inc. ("Regency"). Mr. Long entered into two agreements with Regency or its predecessors, the first in 1972 (the "1972 Agreement"), the second in 1999 (the "1999 Agreement"). Each Agreement contains a broad arbitration provision.

On or about November 29, 1999, Mr. Long's employment with Regency was terminated. Rather than pursuing arbitration as required by the Agreements, Mr. Long filed this lawsuit, alleging nine claims arising from his status as a shareholder or employee, or lack thereof, in Regency. Because the claims made by Mr. Long fall within the scope of the arbitration provisions in the 1972 Agreement and the 1999 Agreement, Regency and other defendants moved to

stay this litigation and compel arbitration. In an Opinion filed April 28, 2000, the Magistrate Judge denied the Motion to Compel Arbitration and Stay Litigation. On April 27, 2001, the Fourth Circuit vacated the Magistrate's Opinion and remanded with instructions. 248 F.3d at 321. This Petition followed.

Mr. Long alleges that in 1972, he entered into an agreement (the "1972 Agreement") with the Silver-Pilzer Company, Inc., the predecessors of defendant Regency, which guaranteed him employment with Regency Bedspread Corporation for so long as he remained a shareholder in Regency Bedspread Corporation. The 1972 Agreement is made as of August 1, 1992, and recites that Regency Bedspread Corporation, Mr. Long's employer, was at that time owned 80% by Silver-Pilzer and 20% by Mr. Long.

Under the 1972 Agreement Mr. Long agreed to purchase 5,263 shares of the Class B common stock of Silver-Pilzer, representing 5% of the issued and outstanding shares of the common stock of that company. The consideration for the purchase was the 25 shares of the common stock of Regency Bedspread then owned by Mr. Long, together with the sum of $13,500.

Pursuant to ¶ 2.1 of the 1972 Agreement, Mr. Long was to be employed by the corporation on a full-time basis in an executive capacity during the period that he was a shareholder of the corporation. Under ¶ 3.2, upon the termination of his employment, Mr. Long was required to sell all his shares of the corporation upon the terms set forth in succeeding paragraphs of the Agreement.

Of particular importance to the issue here, the 1972 Agreement contains a very broad arbitration provision, providing as follows in ¶ 6.1:

> 6.1 *Arbitration*. Any and all disputes and controversies arising out of or in connection with this Agreement, or with respect to the construction and interpretation thereof, or concerning the rights of any one or more parties hereto against any one or more parties hereto, or the respective obligations of each party hereto to each other party hereto, shall be determined by arbitration in accordance with and pursuant to the then existing rules of the American Arbitration Association. (JA 64, emphasis supplied.)

Accordingly, under the 1972 Agreement, arbitration is required for any and all disputes and controversies:

- "arising out of or in connection with this Agreement"; or
- "with respect to the construction and interpretation thereof"; or
- "concerning the rights of any one or more parties hereto against one or more parties hereto"; or
- "the respective obligations of each party hereto to each other party hereto."

The name of Regency Bedspread Corporation was later changed to Regency Home Fashions, Inc., and Mr. Long's shares in Silver-Pilzer became shares in defendant Regency. As of 1999, Mr. Long owned 5,500 shares of Regency's Class B stock.

On or about May 12, 1999, Mr. Long and defendants Louis L. Silver Living Trust, Louis L. Silver, Ronald Grossman and Kevin Creegan, who comprised all the shareholders in Regency, entered into a Shareholders Agreement (the "1999 Agreement"). The 1999 Agreement provides for general restrictions on share transfer; a right of first refusal for non-selling shareholders; and the redemption of each shareholder's stock in Regency upon termination of that person's employment with Regency or upon that person's death.

Like the 1972 Agreement, the 1999 Agreement contains a broad arbitration provision, stating as follows in ¶ 9(g):

> (g) *Governing Law; Arbitration.* This agreement shall be construed and enforced in accordance with the laws of the state of New York applicable to contracts and agreements executed and to be performed wholly in New York. The parties hereby irrevocably and unconditionally agree that any dispute arising out of or relating to this Agreement or the breach, termination or validity thereof will be submitted by the parties to binding arbitration by a single arbitrator to take place in New York City under the rules of the American Arbitration Association then in effect. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof, with the attorneys fees and expenses of the prevailing party paid by the other party. (JA 81-82, emphasis supplied)

The 1999 Agreement accordingly requires arbitration for any dispute:

- "any dispute arising out of or relating to this Agreement"; or
- "the breach, termination or validity [of the Agreement]."

On or about November 29, 1999, Mr. Long's employment with Regency was terminated. Rather than pursuing arbitration, Mr. Long filed this lawsuit in state court in North Carolina alleging nine causes of action arising from his status as a shareholder or employee, or lack thereof, in Regency. Mr. Long's claims very plainly are subject to the above-quoted arbitration provisions, and accordingly the Magistrate Judge erred in refusing to compel arbitration, and the Fourth Circuit correctly vacated the Magistrate's Opinion.

REASONS FOR DENYING THE WRIT

The sole reason argued by the Petitioner for granting the Writ is that, according to the Petitioner, there is a conflict among the Circuits regarding the test for determining when claims are arbitrable. Petitioner is incorrect, as demonstrated by the very cases that Petitioner cites in support of this misguided argument. In fact, there is no conflict among the Circuits, and the Fourth Circuit's decision is in accord with longstanding precedent from this Court and other Fourth Circuit decisions.

I. ***Where, as here, the arbitration clause is broad, the dispute is presumed to be arbitrable.***

Under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, a written agreement to arbitrate disputes that arises out of a contract involving transactions in interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The FAA was designed to override judicial reluctance to enforce arbitration agreements, to relieve court congestion, and to provide parties with a speedier and less costly alternative to litigation. *See Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 270, 280, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 52-54, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995).

When asked by a party to compel arbitration under a contract, a Federal Court must determine whether the parties agreed to arbitrate the dispute at issue. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985). In construing the scope of an arbitration clause, courts operate under a pronounced presumption of arbitrability:

> [W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers that the asserted dispute. Doubts should be resolved in favor of coverage."

AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 650, 106 S. Ct. 1415, 89 L. Ed. 2d

648 (1986) (second alteration in original) (quoting *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 581-82, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960). The FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). This presumption of arbitrability is particularly applicable where, as here, the arbitration clause at issue is broad. *AT&T Technologies*, 475 U.S. at 650. *See also Soler Chrysler-Plymouth*, 473 U.S. at 626 (any ambiguities in the contract or doubts as to the parties' intentions should be resolved in favor of arbitration).

II. *There is no conflict among the Circuits.*

Mr. Long argues that "Circuits throughout the United States use differing standards in their analysis" of whether claims are arbitrable. (Pet. at 7) In particular, he argues that the Fourth, Seventh and Tenth Circuits use what he terms a "significant relationship" standard, citing *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88 (4th Cir. 1996); *Kiefer Specialty Flooring, Inc. v. Tarkett, Inc.*, 174 F.3d 907 (7th Cir. 1999); and *P & P Industries, Inc. v. Sutter Corporation*, 179 F.3d 861 (10th Cir. 1999). *Id.*

On the other hand, according to Mr. Long, the Eleventh, Ninth, Eighth, Sixth, Fifth, Third and Second Circuits use what Mr. Long calls a "language of the agreement and intent of the parties" standard. To support this argument, Mr. Long

cites *Telecom Italia, SPA v. Wholesale Telecom Corp.*, 248 F.3d 1109 (11th Cir. 2001); *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126 (9th Cir. 2000); *Lebanon Chemical Corporation v. United Farmers Plant Food, Inc.*, 179 F.3d 1095 (8th Cir. 1999), *cert. denied*, 528 U.S. 1079, 120 S. Ct. 798, 145 L. Ed. 2d 673 (2000); *Stout v. Byrider*, 228 F.3d 709 (6th Cir. 2000), *cert. denied*, __ U.S. __, 121 S. Ct. 1088, 148 L. Ed. 2d 963 (2001); *Texaco, Inc. v. American Trading Transportation Company, Inc.*, 644 F.2d 1152 (5th Cir. 1981); *Battaglia v McKendry*, 233 F.3d 720 (3d Cir. 2000); and *Louis Dreyfus Negoce, S.A. v. Blystad Shipping & Trading, Inc.*, 252 F.3d 218 (2d Cir. 2001). *Id.*

A reading of these decisions and others discloses that the alleged conflict among the Circuits is wholly illusory. In all the Circuits, the test is whether the claims made in the Complaint are within the scope of the arbitration provisions to which the parties have agreed. Since arbitration provisions are of course not worded identically in each case, courts have used various terms in describing the relationship between the claims made and the language of the contract, *e.g.*, "significant," "direct," and the like, and differing terms in characterizing the language of the provisions themselves, *e.g.*, "broad," "narrow," and the like. In each case, however, and in all the Circuits, the test is the same: whether the claims made in the complaint fall within the scope of the arbitration provision. There is no conflict among the Circuits, as explained more fully below.

Moreover, the alleged "language of the agreement and intent of the parties" test exists only in the mind of counsel for the Petitioner. It is not contained in the cases cited by Petitioner, and is not a standard in use, as demonstrated below. Indeed, the Petitioner goes so far as to admit in his

below. Indeed, the Petitioner goes so far as to admit in his Petition that there is *no per se* rule for interpreting arbitration provisions (Pet. at 16) and that there are *no* clear rules as to whether particular claims are covered by specifically-phrased agreements, with each case to be analyzed on an individual basis, (Pet. at 14).

In these admissions the Petitioner correctly defeats his own argument. There are in fact no *per se* "significant relationship" or "language of the contract and intent of the parties" tests, as the Petitioner urges, that enable courts to robotically slot particular claims into the categories of "arbitrable" or "non-arbitrable." Rather, the test in each case, and in every Circuit, is whether the claims made in the complaint are within the scope of the particular arbitration provision in the contract at issue.

III. *There is no "language of the agreement and intent of the parties" test.*

As set forth above, the Petitioner cites seven decisions in support of his contention that seven different Circuits have adopted what he calls a "language of the agreement and intent of the parties" test. The decisions cited by the Petitioner do not support this argument.

In *Telecom Italia, supra*, the issue was whether the *third*-party defendant, Telemedia International ("TMI"), could take advantage of an arbitration clause in the contract between the plaintiff and the defendant. The contract between the plaintiff and TMI International, the third-party defendant, contained *no* arbitration clause. The District Court ruled that the third-party complaint was not subject to the arbitration clause in the contract between the plaintiff and the defendant,

because the claims set forth within the third-party complaint did not involve the contract between the third-party defendant and the defendant. Rather, the clams were based on allegations of tortious interference and conspiracy relating to the disruption of the separate contract, *i.e.*, the contract between the plaintiff and the defendant, which did *not* contain an arbitration clause. The Eleventh Circuit affirmed, concluding that the defendant's tortious interference claim against the third-party defendant neither arose out of nor related to the defendant's contract with the plaintiff, which was the contract that contained the arbitration clause.

The "arises out of or is related to" language in the contract between the plaintiff and the defendant in *Telecom Italia* is quite similar to the language contained in the agreement at issue here. The Eleventh Circuit reviewed prior decisions by that Court, and harmonized the results in those decisions by focusing on whether the tort or breach in question was a result of the performance of contractual duties. According to the Eleventh Circuit,

> [d]isputes that are not related — with at least some directness — to performance of duties specified by the contract do not count as disputes "arising out of" the contract, and are not covered by the standard arbitration clause . . . [h]owever, where the dispute occurs as a fairly direct result of the performance of contractual duties . . . then the dispute can fairly be said to arise out of or relate to the contract in question, and arbitration is required.

248 F.3d at 1116.

This approach is of course quite similar to that used by the Fourth Circuit in this case, substituting the word "direct" for "significant." Put simply, the Eleventh Circuit held, as do all other courts, that there must be some relationship between the claims in question and the agreement containing the arbitration clause. The Eleventh Circuit did not, as the Petitioner alleges, use a "language of the agreement and intent of the parties" test.

In *Chiron Corporation*, 207 F.3d 1126 (9th Cir. 2000), the Ninth Circuit decision relied upon by the Petitioner, there was not even an issue as to whether the dispute fell within the scope of the arbitration agreement, the Court stating that "the dispute falls squarely within their [the parties] broad arbitration agreement." 207 F.3d at 1128. Rather, the issue was who — the arbitrator or the court — should adjudicate the preclusive effect of a *res judicata* defense asserted by the defendant. The Ninth Circuit held that issue should be adjudicated by the arbitrator. The Court did not even discuss, much less use, a "language of the agreement and intent of the parties" test.

The language of the agreement at issue in *Chiron* provided for arbitration of "any dispute, controversy or claim arising out of or relating to the validity, construction, enforceability or performance of this agreement," and the dispute over the *res judicata* defense "unquestionably arises from or relates 'to the construction, enforceability or performance of the agreement'. . . ." Accordingly, it fell within the parties' agreement to arbitrate, and the Ninth Circuit found that "as the FAA 'leaves no place for the exercise of discretion by a district court . . . [,]' the district court was correct in finding that the dispute is arbitrable." 207 F.3d at 1131, citing *Dean Witter Reynolds, Inc. v. Byrd*,

470 U.S. 213, 218, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985). *Accord*, *FedEx Ground v. Metheany*, 2000 WL 1585267 (N.D. Cal. 2000) (the merits of a claim, including any defenses such as a procedural default, should be left to the arbitrator once arbitrability has been determined).

In *Lebanon Chemical Corporation*, 179 F.3d 1095 (8th Cir. 1999), *cert. denied*, 528 U.S. 1079, 120 S. Ct. 798, 145 L. Ed. 2d 673 (2000), the dispute concerned twenty-nine invoices for grass seed from the defendant to the plaintiff. A prior grass seed contract between the parties, for seeds which had been delivered and paid for in full, had contained an arbitration clause for disputes "arising from a contract started or concluded under [the ASTA rules]." 179 F.3d at 1100. The defendant argued that the subsequent disputed invoices were addenda, or supplemental contracts, to the contract containing the arbitration clause, and that accordingly the arbitration clause in the contract gave it the right to present all the disputed invoices to arbitration. *Id.*

The Eighth Circuit disagreed, finding that the arbitration clause in the contract provided arbitration only for disputes arising from a contract started under ASTA (American Seed Trade Association) rules. The dispute at issue concerning the unpaid invoices did not arise from such a contract, and accordingly the subsequent dispute involving unpaid invoices was not covered. Again, the Court did not use any "language of the agreement and intent of the parties" test. Rather, as all other Circuits do, it simply examined the claims at issue — and in that case, the events from which those claims arose — and determined whether those claims were included within the scope of the arbitration clause in the contract at issue. *Accord*, *Plastech Exterior Systems, Inc. v. Deere & Company*, 2000 WL 631329 at *3 (N.D. Ill. 2000) (contract

with arbitration clause between plaintiff and one John Deere facility was not applicable to dispute between plaintiff and another separate John Deere facility).

In *Stout v. Byrider*, 228 F.3d 709 (6th Cir. 2000), the Circuit decision cited by Petition, the issue was not whether the parties had agreed to arbitrate, or the scope of the arbitration agreement, but rather whether Congress intended for certain federal statutory claims — in that case Truth in Lending Act ("TILA") claims — to be arbitrable. The District Court determined that the TILA claims were arbitrable, the Eighth Circuit affirmed, finding that neither it nor the courts of Ohio have the ability to mandate judicial resolution of such disputes in violation of the parties' arbitration agreement. 228 F.3d at 716.

In *Texaco, Inc. v. American Trading Transportation Company*, 644 F.2d 1152 (5th Cir. 1981), a Fifth Circuit admiralty case cited by Petitioner, Texaco asserted claims for damages to a dock following a boat collision involving a boat owned by the defendant. A clause in the Charter to Texaco provided for arbitration of disputes arising out of the Charter. The District Court denied the defendant's motion to stay the litigation pending arbitration, and the Fifth Circuit affirmed, because the complaint was not the result of a difference or dispute arising out of the Charter. Rather, it was an admiralty claim for damages to Texaco's dock arising from the alleged negligence of the defendant and unseaworthiness of the boat. "The existence *vel non* of the Charter is not dispositive of this claim for delictual damages; the claim as alleged neither arises out of nor depends upon the Charter." 644 F.2d at 1154. As with the other decisions, the Court did not use, or even discuss, any "language of the agreement and the intent of the parties" test. Rather, as all

the Circuits do, it simply compared the language of the claims made against the language of the particular arbitration provision to determine whether those claims fell within the scope of the agreement.

In *Battaglia v. McKendry*, 233 F.3d 720 (3d Cir. 2000), the Third Circuit decision cited by the Petitioner, the dispute was whether the arbitration clause at issue was limited to disputes involving the interpretation and performance of the settlement agreement in which it was contained, or also encompassed disputes going to the formation of that agreement. The plaintiff argued that because the arbitration clause used the language "any controversy [that] arises hereunder," rather than broader language such as "any controversy arising under or related to the settlement agreement," that it did not encompass a claim that the settlement agreement was void from its inception by reason of duress committed by the plaintiff. 233 F.3d at 724-725.

The Third Circuit agreed with the District Court that the arbitration clause was sufficiently broad to reach disputes regarding the formation of the agreement, finding that when phrases such as "arising under" and "arising out of" appear in arbitration provisions (as they do in the agreements at issue in this case), they are normally given broad construction, and are generally construed to encompass claims going to the formation of the underlying agreements. 233 F.3d at 727.

In the final decision relied upon by the Petitioner, *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc.*, 252 F.3d 218 (2d Cir. 2001), the plaintiff sought a declaration that an indemnity claim asserted by the defendant was not subject to arbitration, and that arbitration should be stayed

in favor of legal proceedings in London. The case involved a charter for the transport of soybean oil from the United States to China. A clause in the charter provided for arbitration of "[a]ny dispute arising from the making, performance or termination of this Charter Party. . . ." 252 F.3d at 222. The Second Circuit, as do all other Circuits, found that the language "any dispute arising from the making, performance or termination" was broad and that the indemnity claims at issue were within its scope, since they implicated at least two clauses of the charter, 252 F.3d at 230. Accordingly, the Second Circuit affirmed the District Court's denial of the plaintiff's motion to stay arbitration. The Second Circuit also noted that its decision forty years prior, in *In re Kinoshita*, *supra*, has since been limited to its facts. 252 F.3d at 225-226.

In sum then, the cases cited by the Petitioner for his alleged "language of the agreement and intent of the parties" test simply do not support that proposition. Rather, these decisions — as do decisions of other Circuits — examine the claims at issue against the language of the particular arbitration clauses at issue, then decide whether those particular claims are within the scope of those particular arbitration clauses. The only way in which the intent of the parties enters the question is implicitly, in that when parties use expansive language in drafting an arbitration clause — such as here, where the language "arising out of or in connection with" and "concerning the rights of any one or more of the parties hereto against one or more parties hereto" is used — the parties presumably intend that all issues that pertain to matters within the agreement are to be arbitrated. *See Negoce*, 252 F.3d at 225.

Indeed, Judge Williams even alluded to this point in her decision below, observing that "[h]ere, as in *American Recovery*, the parties explicitly agreed on arbitration clauses 'that by [their] plain language ha[ve] a broad scope.' Thus, it is not inconsistent with the intention of the parties to give the arbitration clauses broad effect." 248 F.3d at 317. This is of course nothing more than an application of the commonsense rule of contract interpretation that parties are presumed to mean what they say. Where, as here, they say that all disputes arising out of or in connection with an agreement, or all disputes concerning the rights of the parties against each other, are to be arbitrated, they are presumed to intend that the words used mean what they say.

Petitioner nonetheless argues that he did not "intend" that the claims that he is making in this civil action be arbitrated, and accordingly that arbitration should not be compelled. If the Petitioner's argument were the law, then of course arbitration would never occur under any agreement unless both parties to that agreement wanted arbitration when the dispute arose. If one party wanted to avoid arbitration, all that party would have to do would be to claim that it did not "intend" that its current claims be within the scope of an arbitration provision to which it had previously agreed. This is not, nor can it be, the law. The simple fact here is that the arbitration agreements mean what they say, and the claims made by the Petitioner here are clearly within their scope. Accordingly, the Fourth Circuit was entirely correct in vacating the Magistrate's Opinion.

Finally, the decisions from the Fourth, Seventh and Tenth Circuits cited by the Petitioner in support of his "split among the Circuits" argument do not support that argument. In *American Recovery Corporation v. Computerized Thermal*

Imaging, Inc., 96 F.3d 88 (4th Cir. 1996), the dispute arose from a consulting agreement providing for arbitration of any dispute that "ar[ose] out of or related to" the consulting agreement. The Fourth Circuit observed that both this Court and the Fourth Circuit had previously characterized similar formulations to be broad arbitration clauses capable of an expansive reach, citing *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 398, 87 S. Ct. 1801, 1803, 18 L. Ed. 2d 1270 (1967) (labeling as "broad" a clause that required arbitration of "[a]ny controversy or claim arising out of or relating to this Agreement"). 96 F.3d at 93. The plaintiff in *American Recovery* argued that the various tort claims it alleged were not within the scope of the arbitration clause. The Fourth Circuit held that it "must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the label assigned to each claim."

Bearing in mind the strong federal policy in favor of arbitration and the broad nature of the arbitration clause, the Fourth Circuit decided that the tort claims at issue in *American Recovery* were within the scope of the arbitration clause at issue, since as each of those claims had a significant relationship to the agreement containing the arbitration clause. This is of course not a different test than that used by the courts in any of the cases discussed above, but rather is another explanation of that test. No matter what one labels the test, the Court's task is to examine the claims made against the language contained in the arbitration agreement.

In *Kiefer Specialty Flooring, Inc. v. Tarkett, Inc.*, 174 F.3d 907 (7th Cir. 1999) and *P & P Industries, Inc. v. Sutter Corp.*, 179 F.3d 861 (10th Cir. 1999), the other two decisions cited by the Petitioner, the Seventh and Tenth Circuits

reached results in accord with all the other Circuits in the decisions discussed above. In *Kiefer*, the arbitration provision provided arbitration for all controversies and claims "arising out of or relating to" the agreements between the parties. 174 F.3d at 909. The clause at issue in *P & P Industries* similarly provided for arbitration of "any controversy, claim or breach arising out of or relating to this agreement." 179 F.3d at 871. In both cases the Courts chose not to evaluate the claims at issue by their label — tort or contract — as the Petitioner wishes to do here. The Seventh Circuit noted that "we have routinely held that a party may not avoid a contractual arbitration clause merely by casting its complaint in tort." 174 F.3d at 910. In both cases, the Courts held that claims for tortious interference arose from or related to the agreements containing the arbitration clauses, and thus were arbitrable. Again, this result was reached by examining the factual allegations in the complaint against language in the arbitration clause, as all other Circuits do. Put simply, there is no split among the Circuits.

IV. *The Magistrate's reversed Opinion in this case was clearly erroneous.*

As discussed above, federal law on this question is uniform. In this case, however, the Magistrate rejected *American Recovery* — indeed, his Opinion did not even cite the case — and instead appeared to borrow language directly from *Siefert v. U.S. Home Corp.*, 750 So. 2d 633 (Fl. 1999), a Florida state court case that may be the only reported decision in this country that has declined to follow *American Recovery*. Put simply, in this case it was embarrassingly apparent that the Magistrate Judge declined to follow binding authority from this Circuit, which was of course erroneous. For this reason as well, the Petition should be denied.

CONCLUSION

For the reasons set forth above, the decision petitioned from was entirely correct, and the Petition should be denied.

Respectfully submitted,

JAMES R. FOX
ALAN M. RULEY*
BELL, DAVIS & PITT, P.A.
100 North Cherry Street, Suite 600
Post Office Box 21029
Winston-Salem, NC 27120-1029
(336) 722-3700

NORRIS D. WOLFF
KLEINBERG, KAPLAN, WOLFF
& COHEN, P.C.
551 Fifth Avenue
New York, NY 10176
(212) 986-6000

Attorneys for Respondents

* *Counsel of Record*